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BACKGROUND NOTES ON THE PROPOSED  
AMENDMENTS TO THE CRIMINAL CODE IN  
RESPECT OF INDECENT ASSAULT  
(BILL C-52)

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## INTRODUCTION

On 1 May 1978 the Minister of Justice, the Hon. Ron Basford, introduced Bill C-52, An Act to amend the Criminal Code.

This Act, as stated in the Minister's press release, is designed to lead to "a major overhaul of the Criminal Code provisions dealing with rape, and particularly to underline the violent nature of the offence of rape in order to minimize the stigma and trauma experienced by rape victims and to encourage the reporting to police of incidents involving rape."

There has been pressure from women's groups for some time for the reform of rape and sexual offence laws.

In 1975, the Advisory Council on the Status of Women (ACSW) published two papers on sexual offences - the first looked specifically at rape and the second examined the whole range of crimes included in the sexual offence section of the Criminal Code. In September 1976, the ACSW made recommendations to the federal government, calling for the rationalization of the laws relating to sex offences.

On the basis of the recommendations made, the contents of Bill C-52 will be examined, its provisions assessed, and recommendations made with a view to suggesting amendments to the proposed legislation to conform to underlying goals which have been advanced by ACSW.

This study of Bill C-52 will consist of three parts: a description of the contents of the Bill, an analysis of the major clauses and a summary of the recommendations contained in the present study.



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## PART A - EXPLANATION OF BILL C-52

Bill C-52 provides for amendments to the Criminal Code and other federal legislation. The primary purpose of the Bill is to remove rape from the Criminal Code and to include within the offence of indecent assault forcible sexual penetration of any orifice of the body. The present crime of indecent assault would be expanded so as to be applicable equally in respect of both sexes. A new offence of aggravated indecent assault, that would apply in cases of severe physical or psychological damage, is proposed.

Although the purpose of the proposed amendments is clear, the "cut and paste" nature of the Bill makes it somewhat difficult to understand. Deletions and additions to the Criminal Code, the Canada Evidence Act, the Divorce Act and the National Defence Act would be made necessary by the suggested changes to the law of rape and indecent assault. The following is a clause-by-clause interpretation of the proposed reforms:

R.S., cc. C-34,  
C-35  
1974-75-76, c.  
93, s. 3(1)

### CRIMINAL CODE

1. All that portion of subsection 6(1.2) of the *Criminal Code* preceding paragraph (a) thereof is repealed and the following substituted therefor:

Offence against  
internationally  
protected  
person

"(1.2) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an Act or omission against the person of an internationally protected person or against any property referred to in section 387.1 used by him that if committed in Canada would be an offence against section 149, 149.1, 218, 219, 245, 246, 247, 381.1 or 387.1 shall be deemed to commit that act or omission in Canada if"

Clause 1 would amend subsection 6(1.2) of the Criminal Code with the effect that every one who commits an indecent assault or an aggravated indecent assault outside of Canada against a foreign dignitary or her/his family would be subject to prosecution in Canada.

1974-75-76, c.  
105, s. 29

2. Section 17 of the said Act is repealed and the following substituted therefor:

Compulsion by  
threats

"17. A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder,

piracy, attempted murder, aggravated indecent assault, forcible abduction, robbery, causing bodily harm or arson."

1974-75-76, c.  
93, s. 8

3. All that portion of subsection 142(1) of the said Act preceding paragraph (a) thereof is repealed and the following substituted therefor:

No question of  
sexual conduct

"142. (1) Where an accused is charged with an offence under subsection 146(1) or 149(1) or section 149.1, no question shall be asked by or on behalf of the accused as to the sexual conduct of the complainant with a person other than the accused unless"

1972, c. 13,  
s. 70

4. Sections 143 to 145 of the said Act are repealed.

Clause 2 would amend section 17 of the Criminal Code with the effect that a person who is forced by threats of death or physical injury to indecently assault another person could not be charged with an offence under the Criminal Code. This would not be the case for a person who commits an aggravated indecent assault under threat of death or physical injury.

Clause 3 would amend subsection 142(1) of the Criminal Code with the effect that the complainant in a charge of indecent assault or aggravated indecent assault could be questioned about her/his previous sexual conduct only with the permission of the court.

Clause 4 would remove the offences of rape and attempted rape from the Criminal Code.



5. Sections 147 and 148 of the said Act are repealed and the following substituted therefor:

"147. A person shall be deemed not to commit an offence under section 146, 149.1 or 150 while that person is under the age of fourteen years.

148. Every one who, under circumstances that do not amount to indecent assault or aggravated indecent assault, has sexual intercourse with a person

(a) who is not his or her husband or wife, and

(b) who is and who he or she knows or has good reason to believe is feeble-minded, insane, or is an idiot or imbecile,

is guilty of an indictable offence and is liable to imprisonment for five years."

Clause 5 would amend sections 147 and 148 to make them applicable to both sexes equally. As a result, section 147 would provide that females and males under fourteen years of age could not be charged with sexual intercourse with a female under fourteen or between fourteen and sixteen (section 146), aggravated indecent assault (section 149.1) or incest (section 150).

Section 148 would prohibit sexual intercourse outside of wedlock with a male or female person known to the accused to be mentally handicapped in terms of one of the categories set out in the section.

The offence of indecent assault, which has been interpreted to mean a touching without consent in circumstances of indecency, would be expanded by clause 6. It would apply to both sexes equally and would include forced sexual penetration of any orifice of the body. Under the proposed subsection 149(2) an indecent assault would also take place when a

6. Section 149 of the said Act is repealed and the following substituted therefor:

"149. (1) Every one who indecently assaults another person is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) An accused who is charged with an offence under subsection (1) or section

149.1 may be convicted if the evidence establishes that the accused did anything to the other person with his or her consent that, but for such consent, would have been an indecent assault or an aggravated indecent assault, if such consent was obtained by personating the spouse of the other person or by false and fraudulent representations as to the nature and quality of the act, or was extorted by threats or fear of bodily harm.

Age

Sexual  
intercourse with  
feeble-minded,  
etc.

1972, c. 13,  
s. 70

Indecent  
assault

Consent by  
false represen-  
tations

victim consents to an indecent contact in cases of indecency because the accused:

(i) impersonated the victim's spouse, (ii) misrepresented the nature of the act or (iii) threatened the victim with physical injury.

The maximum penalty for indecent assault would be fourteen years imprisonment.

A new offence of aggravated indecent assault would be created by the proposed section 149.1. This offence would apply when an indecent assault results in severe physical or psychological damage to the victim. The maximum penalty for aggravated indecent assault would be imprisonment for life.

The proposed section 149.2 provides that "indecent assault" will include sexual penetration of any orifice of the body.

By virtue of the proposed section 149.3 a person who was living under the same roof with her/his spouse could not bring a charge of indecent assault or aggravated indecent

Aggravated  
indecent assault

**149.1** Every one who indecently assaults another person is, where the indecent assault results in severe physical or psychological damage to that other person, guilty of an indictable offence and liable to imprisonment for life.

Indecent  
assault includes  
sexual  
penetration

**149.2** For the purposes of sections 149 and 149.1 and without restricting the generality of the term "indecent assault", an indecent assault includes sexual penetration of any bodily orifice.

Limitation

**149.3** No prosecution shall be instituted under section 149 or 149.1 in respect of an offence alleged to have been committed by a person against his or her spouse unless the spouses were living separate and apart at the material time."



assault against her/him.  
Spouses living separate and  
apart would not be subject to  
this limitation.

Clause 7 would repeal the  
offence of indecent assault  
on a male, which would be  
included in the new offences  
of indecent assault and  
aggravated indecent assault.

Clause 8 would modify the  
definition of "offence" under  
Part IV.1 (Invasion of Privacy)  
of the Criminal Code to delete  
reference to rape and to  
substitute reference to  
indecent assault and aggravated  
indecent assault.

As a result of the amendment  
proposed in clause 9, a person  
who caused the death of another  
while committing an indecent  
assault or an aggravated  
indecent assault could be  
charged with murder.

7. Section 156 of the said Act is repealed.

8. The definition "offence" in section  
178.1 of the said Act is amended by repeal-  
ing the reference to "144 (rape)," where it  
occurs therein and by substituting therefor a  
reference to "149 (indecent assault) and  
149.1 (aggravated indecent assault)."

9. All that portion of section 213 of the  
said Act preceding paragraph (a) thereof is  
repealed and the following substituted  
therefor:

"213. Culpable homicide is murder  
where a person causes the death of a  
human being while committing or  
attempting to commit high treason or trea-  
son or an offence mentioned in section 52  
(sabotage), 76 (piratical acts), 76.1

(hijacking an aircraft), 132 or subsection  
133(1) or sections 134 to 136 (escape or  
rescue from prison or lawful custody), 149  
(indecent assault), 149.1 (aggravated inde-  
cent assault), subsection 246(2) (resisting  
lawful arrest), 247 (kidnapping and for-  
cible confinement), 302 (robbery), 306  
(breaking and entering) or 389 or 390  
(arson), whether or not the person means  
to cause death to any human being and  
whether or not he knows that death is  
likely to be caused to any human being, if"

1972, c. 13,  
s. 70

1976-77, c. 53,  
s. 7(1)

1974-75-76, c.  
93, s. 13

Murder in  
commission of  
offences

1974-75-76, c.  
105, s. 4

10. Paragraph 214(5)(b) of the said Act is repealed and the following substituted therefor:

"(b) while committing or attempting to commit an offence under section 149 (indecent assault) or 149.1 (aggravated indecent assault)."

1974-75-76, c.  
93, s. 38

11. Subparagraphs 429.1(a)(ii) and (iii) of the said Act are repealed and the following substituted therefor:

"(ii) section 149.1,"

1974-75-76, c.  
93, s. 44

12. Subsection 442(3) of the said Act is repealed and the following substituted therefor:

"(3) Where an accused is charged with an offence mentioned in subsection 142(1), the presiding judge, magistrate or justice may, or if application therefor is made by the complainant or prosecutor, shall, make an order directing that the identity of the complainant and his or her evidence taken in the proceedings shall not be published in any newspaper or broadcast.

(3.1) The presiding judge, magistrate or justice shall, at the first reasonable opportunity, advise the complainant of his or her right to make an application for an order under subsection (3)."

Order  
restricting  
publication

Complainant to  
be advised of  
right

Under the amendment proposed in clause 10, a person charged with murder for causing death during the commission of an indecent assault or an aggravated indecent assault would be charged with first degree murder. The maximum penalty would be life imprisonment.

The effect of the amendment proposed by clause 11 would be that a person charged with aggravated indecent assault could elect trial before a judge and jury in a superior court of criminal jurisdiction. A person charged with indecent assault could elect trial by judge and jury, but not in a superior court.

The amendment proposed in clause 12 would give both prosecutor and complainant the right to an order from the court prohibiting publication of the complainant's identity and evidence in cases involving charges of indecent assault, aggravated



indecent assault, and sexual intercourse with a female under fourteen. The presiding judge would be required to advise the complainant of her/his right to such an order at the first reasonable opportunity.

Clause 13 would include the offences of indecent assault and aggravated indecent assault in the definition of "serious personal injury offence" under Part XXI (Dangerous Offenders) of the Code. Only persons convicted of serious personal injury offences may, in some cases, be classified as dangerous offenders and sentenced to imprisonment for an indefinite period of time.

As a result of the amendment to the Canada Evidence Act proposed in clause 14 the spouse of a person charged with indecent assault or aggravated indecent assault could be required to testify at her/his trial.

1976-77, c. 53,  
s. 14

13. Paragraph (b) of the definition "serious personal injury offence" in section 687 of the said Act is repealed and the following substituted therefor:

"(b) an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault), 149.1 (aggravated indecent assault), or 157 (gross indecency)."

14. Subsection 4(2) of the *Canada Evidence Act* is repealed and the following substituted therefor:

Sexual offences

"(2) The wife or husband of a person charged with an offence against section 33 or 34 of the *Juvenile Delinquents Act* or with an offence against any of sections 146, 148, 149, 149.1, 150 to 155, 157, 166 to 169, 175, 195, 197, 200, 248 to 250, 255 to 258, 289, paragraph 423(1)(c) or an attempt to commit an offence under section 146 or 155 of the *Criminal Code*, is a competent and compellable witness for the prosecution without the consent of the person charged."

15. Paragraph 3(b) of the *Divorce Act* is repealed and the following substituted therefor:

"(b) has been guilty of sodomy, bestiality, an offence against section 149 or 149.1 of the *Criminal Code* involving sexual intercourse, or has engaged in a homosexual act;"

16. Section 60 of the *National Defence Act* is repealed and the following substituted therefor:

"60. A service tribunal shall not try any person charged with an offence of murder, or manslaughter, or with an offence against section 149.1 of the *Criminal Code*, committed in Canada."

Non-triable  
offences

Offences

17. (1) An offence committed prior to the coming into force of this Act against any provision of law amended by this Act shall be dealt with in all respects as if this Act had not come into force.

Grounds for  
divorce

(2) For the purposes of paragraph 3(b) of the *Divorce Act*, as enacted by section 15 of this Act, a person who has been guilty of an offence against section 143 of the *Criminal Code*, as it read before the coming into force of this Act, shall be deemed to have been guilty of an offence against section 149 or 149.1 of the *Criminal Code* involving sexual intercourse, as enacted by section 6 of this Act.

Commence-  
ment

18. This Act shall come into force on a day to be fixed by proclamation.

Clause 15 would include a conviction for indecent assault or aggravated indecent assault when involving sexual intercourse as grounds for divorce under the *Divorce Act*.

Clause 16 would amend the *National Defence Act* with the effect that a service tribunal could try a charge of indecent assault but could not try a charge of aggravated indecent assault.

As a result of the amendment proposed in clause 17 an offence committed, but not tried, before Bill C-52 is enacted would be tried as if the Bill had not been made law.

For the purposes of the *Divorce Act*, the conviction of a spouse for rape would remain a grounds for divorce after Bill C-52 is enacted.

Clause 18 states that there is no date fixed for Bill C-52 to become law.



PART B - ANALYSIS OF BILL C-52

The ACSW in its study of sexual offences has proposed that current sexual norms and mores and the present understanding of male and female sexuality be reflected in the law. On this basis it has delineated two general categories of sexual offences which are legitimate concerns to the law.

"First, there are those which involve some form of physical or mental harm or the threat of these to a person. These are cases in which one person clearly infringes on the rights of another unjustifiably. Such violations threaten a person's mental as well as physical health because a person's most integral sense of self is associated with her/his self-control of bodily functioning. Violation of the body leads to a sense of helplessness and is therefore mentally as well as physically traumatic. While the right of individuals to control their own bodies has not been recognized in all societies, it does appear as an accepted premise in North American society. We believe the law should recognize this right."

"Secondly, there are offences which involve some form of possible moral "corruption" of children and these too are clearly matters of law. Children do not have the experience on which to base decisions about sexual activities. It can be argued that if they are induced to engage in sexual acts without an awareness of what they are doing and feeling, a pattern may be established which would be contrary to a personal evaluation that would properly be made at a later stage of development. Sexual education, knowledge and experience develop the conscious awareness of human sexuality. It is just and a societal responsibility, to protect children and those adults who do not have the ability to understand and to make decisions about their sexual behaviour."

It is within the context of this approach that the evaluation of Bill C-52 will be undertaken.

# 1. SCOPE OF THE LAW

The Bill which has been introduced proposes amendments to the Criminal Code provisions dealing with rape and indecent assault. Of those sections on which ACSW has made recommendations, the Bill repeals or amends sections 144, 145, 147, 149 and 156. It does not deal with other sexual offences in the Code. The following provisions on which ACSW has also made recommendations will remain in the Code unamended under the proposed reform: Subsection 146(1) (sexual intercourse with a female under 14); subsection 146(2) (sexual intercourse with a female 14 to 16); section 150 (incest); section 151 (seduction of a female between 16 and 18); section 152 (seduction under promise of marriage); section 153 (sexual intercourse with female employee, step-daughter, foster daughter or female ward); section 154 (seduction of female passengers on vessels); section 155 (buggery or bestiality); and section 157 (acts of gross indecency).

The stated intent of the work that ACSW undertook in this area was to recommend amendments to the Criminal Code which would involve an overall revision of the law in this area and would incorporate a philosophy of sexuality which reflected present values and norms.

The ACSW recommendations were premised on a presumption that every individual is entitled to individual autonomy, self-determination and self-respect. This can only be accomplished if the sexual offence legislation is amended in its entirety. Piecemeal amendments do not accomplish the goal of removing the archaic paternalism and blatantly discriminatory attitudes towards women which exist

in this section of the Code. The stigma attached to women who are victims of sexual crimes is predicated not only upon societal attitudes but also upon laws which do not accurately reflect present understanding of male and female sexuality. Limited reform, while helping to alleviate some immediate problems, unfortunately will not contribute to a greater understanding of the nature of criminal behavior related to personal sexuality. The impact of reform will be reduced and the presumptions of other laws may well be reflected back onto the new reforms with the result that their effectiveness will be undermined. Band-aid reform can only have a limited effect. It is apparent that a more sweeping reform is needed for the proposed reforms to be effective and to accomplish their outlined goals.

## 2. RAPE AS INDECENT ASSAULT

Under the proposed amendments, the present offences of rape, attempted rape and indecent assault on a male would be removed from the Criminal Code and the section on indecent assault on a female would be expanded to include sexual penetration of any bodily orifice. The section would be made applicable to both sexes.

### a) Location of the Crime in the Code

Although the proposed changes take into account that rape is not a sexual crime but a crime of an assaultive nature, it fails to fully acknowledge the purpose of the law which is to guarantee the inviolability of a person's body. Sexual assault, like any other assault, is a crime of violence against the person. By having it in the part of the Code dealing with sexual offences rather than placing it in the appropriate part (Part VI - Offences Against the Person and Reputation) this fact is not adequately recognized.



In addition, the term "indecent assault" has a negative social and legal tradition. Indecency is a subjective term fraught with mythology and moral judgements. The stigma and trauma experienced by rape victims are unlikely to be alleviated by expanding a section of the Code which itself suffers from the same misunderstandings as the rape section.

The negative connotations surrounding the use of the term "indecent assault" are likely to be transposed onto the new law. If this happens, the stigma that attaches to the victim of the assault will not be reduced.

b) Expansion of the Definition of Penetration

The proposed definition of indecent assault includes sexual penetration of any bodily orifice. Including all bodily orifices is a significant addition. It recognizes that the personal violation implied in forcible sexual penetration of orifices other than the vagina is as great as it is in the case of vaginal penetration. Unfortunately it is unclear whether the term "sexual penetration" includes the intrusion of any object, besides a penis, into the genital, oral, or anal openings of the body of another person. Since, however, penetration is no longer an essential element of the crime, this clarification may not be necessary.

c) Meaning of Indecent

While indecent assault is not defined in the Code, it has been interpreted to mean the intentional touching of a person without that person's consent, in circumstances of indecency. The incorporation of penetration into the indecent assault section

of the Code, while expanding the section, does not clarify the meaning of "indecent". As "indecent" is not defined in the Code, it is unclear what elements of sexual contact will be included. This is an important matter of policy which should be spelled out in the legislation.

d) Extortion of Consent

Under the proposed law, where the victim has consented, but the consent has been extorted by means including "personating the spouse of the other person or by false and fraudulent representations as to the nature and quality of the act, or threats of bodily harm", a conviction for indecent assault may still result. By not expressly stating that this exception includes threats or fear of bodily harm to significant others as well as oneself, it is highly likely that this type of threat may not be included. Since one is as likely to consent if the threat is to a person important to oneself as if the threat is to oneself, it should be made clear in the law that both are to be included.

In addition to this, "personating the spouse" of the other person and "false or fraudulent representation of the circumstances of the crime" are questionable inclusions. Deceit is a tenuous basis for a crime of this severity. The criminal law cannot be expected to protect each individual from all other people in all circumstances. An individual other than a child should have enough information available to her/him to be aware of such deception. Since the crime does not involve any kind of physical damage

and the mental damage would be unlikely to be significant, it is questionable that these conditions are necessary in the law. They may be seen as reflecting outmoded attitudes towards sex and sexuality. If some persons are unable to differentiate between fraudulent and non-fraudulent sexual relationships, then sexual education programmes need to be improved. The law should not be used to compensate for the failure of education or other social programmes.

### 3. APPLICABILITY TO BOTH SEXES

The proposed legislation applies equally to both sexes. This is a significant change, which recognizes that if forcible aggressive acts and humiliation are crimes, then they must be considered illegal and unacceptable in all circumstances. All persons regardless of gender have a right to be protected from such acts. It also recognizes the known facts about such behavior. It removes the spurious notion that men and women are not entitled to equal protection under the law. It also removes the anomaly under the present law whereby indecent assault on a male carried a significantly higher sentence than indecent assault on a female, as well as the anomaly whereby a female could not be charged with indecent assault on a male.

Changes applying the same protection under the law for both men and women should be made to all sections of the Criminal Code.



#### 4. AGGRAVATED INDECENT ASSAULT

Under the proposed legislation two types of assault are specified: indecent assault and aggravated indecent assault. Including two types is an important amendment because it recognizes that the law is protecting the inviolability of the person (indecent assault) as well as protecting against physical and mental aggression where severe damage results (aggravated indecent assault).

There are two comments which may be made as to the delineation of the crime in this way:

##### a) Degrees of Indecent Assault

ACSW recommended four counts of assault - taking into account penetration and contact and whether or not psychological and phusical damage were incurred as a result of the crime. All of these elements are included in the two types of indecent assault proposed in the new Bill. Although the qualitative differentiation between penetration and contact proposed by ACSW is not made, the intent of the ACSW recommendations to include both as elements of the crime is incorporated. The sentencing process could be used to recognize the presence or absence of penetration. The recommendation of ACSW that the use of a weapon be considered as a circumstance of the crime should also be incorporated into the new law. Under the proposed law, if a person indecently assaulted another person at gunpoint and there was no "severe physical or psychological damage", the charge would be indecent assault rather than aggravated indecent assault.

b) Damage Ensuing from the Crime

The proposed law acknowledges both psychological and physical damage. That psychological damage is a result of indecent assault has been well documented and the recognition in law of this reality is a bold and important step in making the law more equitable, just and rational. That the application of this amendment could possibly be difficult should not be a reason for denying the principle, and the proposed law recognizes this fact.

5. SENTENCING

The maximum sentences proposed under the new reformulations are 14 years for indecent assault and life imprisonment for aggravated sexual assault. Although maximum sentences are generally indicative of the severity of a crime, their severity may have the unintended consequence of making judges and juries hesitant about convicting guilty persons. This is more likely in the case of indecent assault because of the still widely-held misunderstandings about the crime and the common mistaken folklore that has built up around rape. The deterrent effect of the sentencing provisions may have greater effect on the behaviour of judges and juries than on potential offenders.

6. INDECENT ASSAULT WITHIN MARRIAGE

The proposed amendments enable spouses to charge each other with indecent assault or aggravated indecent assault if they are living separate and apart at the time of the offence. Spouses living together are exempt, however, from the law. The present section of the Code dealing with indecent assault on a woman does not exclude a woman charging her husband with this offence. Although this omission in the present law was probably an oversight

in drafting that law, the result is that the new amendment restricts the protection from indecent assault that married women are at present accorded. This legal impossibility of one spouse indecently assaulting another while living together undermines a basic component of the crime. A person suffers the same pain, humiliation, and fear from sexual assault regardless of who the offender is. Because a person is married she/he is denied a protection given to other persons. In effect, the law allows a person cohabiting with a spouse to indecently assault her/his spouse with impunity, thus sanctioning the idea that a person is the property of her/his spouse. This is particularly serious for married women who because of economic circumstances are unable to leave the matrimonial home.

7. QUESTIONING COMPLAINANTS ABOUT PREVIOUS SEXUAL CONDUCT

The procedure and substance of questions about the complainant's previous sexual conduct have not been altered under the proposed amendments, except to make them applicable to both male and female victims.

In 1975, amendments were made to the Code to limit the cross-examination of complainants about past sexual conduct to questions that a judge determines are specifically required for a just determination of a case.

Although this requirement restricts the reasons for which such questions may be asked, it does not eliminate the possibility of abuse of the complainant. The "just determination of a case" may depend upon any one of a number of issues, and consequently it is possible to justify questioning a complainant about her/his previous sexual conduct for virtually any reason. Allowing such questioning of the complainant, even with this amendment, does not ensure that the questioning is limited to the issue of consent.



The presence or absence of consent by the complainant will continue to be relevant in charges of indecent assault. An assault is defined in law to be an unwanted touching or, in other words, a touching without consent. In order for the prosecution to establish that an indecent assault occurred, it will have to prove that the complainant did not consent to the touching or contact. This should not be difficult to establish in cases where there is obvious proof of non-consent such as bruises or other evidence of struggle. Non-consent may be more difficult to prove in other cases. In neither case, however, does it necessitate unrestricted questioning of the victim.

An acceptable approach to the limiting of questions of evidence concerning the complainant's previous sexual conduct was set out by the Law Reform Commission in its report, Evidence. The Commission recommended that such questions be permitted only when the presiding judge is of the opinion that they are necessary to a just determination of the guilt or innocence of the accused. This would impose a heavier burden upon the accused to establish that such questioning is relevant to the central issue of the case at hand. It imposes sufficiently narrow limits on the circumstances in which evidence concerning the complainant's previous sexual conduct would be permitted and provides greater protection to the victim from unjustified infringement of her/his privacy.

There is at present an inconsistency between the questioning relating to the character of the complainant and the questioning relating to the accused. If one is willing to allow questions about the complainant's credibility then surely the credibility of the accused should be questioned on the same basis. Prosecution lawyers are not able to question a person about the nature of previous criminal convictions. Thus, an accused's previous convictions for rape, for instance, would be unlikely to be divulged at the trial. The inadequacies

of a law which allows over-examination of a complainant and no examination of the accused about previous sexual conduct are evident.

8. SEXUAL INTERCOURSE WITH THE MENTALLY HANDICAPPED

The restriction on sexual intercourse with the mentally handicapped is modified by the proposed amendments to apply equally to both sexes. Although it can be argued that the law should protect those persons who are unable to protect themselves, it cannot be a priori assumed that the delineated categories are limited to such persons. The categories specified are no longer used in clinical situations, and are not in any case scientifically defineable. The consequence of this provision is therefore to deny sexual expression to the mentally handicapped outside marriage. (Some provincial laws restrict marriage of the mentally handicapped, thus such persons in these provinces would be legally restricted to a chaste existence.) Exploitation should be prohibited by law, but this does not necessitate these restrictions on the sexual expression of the class of persons who are mentally handicapped.

9. PROCEDURAL CONCERNS

There are a variety of procedural problems which are extremely critical if the crime of rape and its effects are to be dealt with. For new laws to be effective, they must be accompanied by changes in procedure and social policy. Some of the most critical changes needed are dealt with below. All of these have been previously recommended by ACSW.

a) Exclusion of Public

Bill C-52 makes no changes in the procedures regarding the exclusion of the public from court proceedings. The present law requires that when a judge, on the application of the prosecution or the accused, denies an order to exclude the public she/he must give reasons for so doing. Given that reform usually comes about through some form of public pressure and that one of the basic premises of democracy is a fair and just trial, exclusion of the public from trial proceedings must be faced with extreme caution. The law is not necessarily less just in closed hearings than in open hearings, but the right to monitor the legal system must be stringently guarded. The earlier recommendation of ACSW is therefore of vital importance in upholding such principles of law:

That when a judge, upon application by the accused or prosecution, makes an order excluding the public from sexual assault proceedings, the judge should be required to give reasons for such exclusion of the public. This would replace the present provision requiring the judge to give these reasons when such exclusion is denied.



b) Victim Compensation

In January 1973 the federal government enacted an assistance plan for compensation for victims of crime. This is a federal-provincial cost sharing agreement. Included among the list of crimes for which compensation might be available were rape, rape with assault causing bodily harm, rape with robbery, rape with indecent assault, indecent assault, attempted rape, wounding and rape, murder and rape, and maintenance of a child born as a result of rape. Presumably, if the proposed reforms are enacted indecent assault and aggravated indecent assault will be included among such crimes.

ACSW has expressed concern about the general lack of awareness of the existence of victims' compensation and of how and when to apply for payments under this programme. Publicity about it does not appear to have increased and the general unawareness continues. The need to implement ACSW's recommendation remains:

That responsibility be designated to ensure that victims of sexual offences are advised of the availability of victims' compensation, as well as how and when to apply for it, and the evidence requirements for receiving such compensation.

c) Funding for "Life Crisis" Centres

The need being fulfilled by rape crisis centres has been acknowledged by the police, the courts, the hospitals and the general public as well as the victims of sexual assaults. According to all accounts, demand on facilities has increased as these centres have become more well known. To be

fully effective, such centres need a secure funding base. Since their inception, valuable energy and time have been spent by workers in simply trying to secure funds for operating expenditures. Such services, in conjunction with services for other life crises, should be available on a secure and continuing basis. Recognizing the vital services being provided, the prior ACSW recommendation is therefore reiterated:

That "life crisis" centres be established through federal government funding, and that these centres employ staff members who are specifically trained to deal with victims of sexual assault or other sexual offences.

d) RCMP Training

The police play an integral role in the process of criminal law. They are central figures in cases of reported offences and even in the determination of the reporting of crimes. Often they are the first persons, after the offender, with whom the victim has contact. They may also be key witnesses in the trial proceedings. That these persons should understand the psychological, social and legal implications for a victim of a sexual offence cannot be too strongly emphasized. The attitudes of the police officers involved, their knowledge of the law and the criminal proceedings, and their ability to impart the necessary information are vital to the execution of justice. Training to ensure that police officers are familiar with the specific circumstances of sexual offences is very important to both victims and accused. It is also necessary to encourage the police and personnel in crisis centre programmes to work together to reduce the

incidence of such crimes and to eliminate its effects. The federal government should ensure the implementation of the 1976 recommendation of ACSW for the RCMP which is within its constitutional jurisdiction:

That educational programmes be developed for persons involved in the preventive programmes for treatment of or prosecution of persons, either victims or accused, involved in crimes of a sexual nature. There should be persons specifically trained to provide information to victims of sexual offences in all police departments.



## PART C - RECOMMENDATIONS

The explanation and analysis of Bill C-52 "An Act to Amend the Criminal Code and to amend certain other Acts in relation thereto or in consequence thereof" has led to a number of recommendations. These recommendations suggest ways in which the proposed amendments could be modified or changed to enable them to meet the goals for which they were designed and to conform to ACSW recommendations in the area.

1. An overall revision and rationalization of the Criminal Code with respect to sexual offences is needed to guarantee the right to individual autonomy, self-determination and self respect of all persons in the area of sexual behavior.
2. Because of the legal and social stigma attached to victims of assaults involving sexual contact or penetration, the place as well as the name of the offence is important. Using the term "indecent" without a very specific definition of what that term means may aggravate this problem. Legislation relating to assaults involving sex should be placed in the part of the Criminal Code dealing with offences against the person (P.VI - Offences Against the Person and Reputation). If the section remains, a specific definition of the term indecent, to include sexual contact, must be included in the law.
3. The differentiation of the two counts of indecent assault should include the circumstance of the crime as well as its effect. To do this would require that where an armed indecent assault took place, it would be an offence of aggravated indecent assault even when psychological and physical damage did not ensue.

4. The maximum sentences for indecent assault and aggravated indecent assault should be reduced to ensure they do not act as deterrents in convicting guilty parties.
5. The interspousal exemption should be removed to make the law applicable to all persons, regardless of marital status.
6. Questions relating to the previous sexual conduct of a complainant should only be permitted when they are necessary to a just determination of the guilt or innocence of the accused. Questioning about the accused's previous sexual offences should be permitted on the same basis.
7. The restrictions on sexual intercourse with the mentally handicapped should be removed from the Criminal Code. Such persons should be accorded the same rights to sexual expression and the same protections from undue exploitation and mental and physical harm as all other persons.
8. Procedural Amendments:
  - a) When a judge, on application of the prosecution or the accused, makes an order excluding the public from sexual assault proceedings, she/he should be required to give reasons for the order. This should replace the present provision requiring the judge to give reasons when such exclusion is denied.

- b) Responsibility should be designated to ensure that victims of sexual offences are advised of the availability of victims' compensation, how and when to apply for it, and the evidence requirements for receiving such compensation.
- c) "Life crises" centres should be established through federal government funding and these centres should employ staff members who are specifically trained to deal with victims of sexual assault and other sexual offences.
- d) Educational programmes should be developed for those involved in dealing with persons, either victims or accused, involved in crimes of a sexual nature. The competent authorities should ensure that there are persons in the police forces responsible for enforcing these provisions of the Criminal Code who are specifically trained to provide information to and to deal with victims of sexual offences.



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